IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 788 of 1998

in

SPECIAL CIVIL APPLICATION No. 3635 of 1982

For Approval and Signature:

Hon'ble MR.JUSTICE M.R.CALLA

and

Hon'ble MR.JUSTICE N.G.NANDI

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

==========

STATE OF GUJARAT

Versus

KUSUMBEN E BORASADA

Appearance:

Ms. Harsha Devani, Assistant Government Pleader
for Appellants.
Mr. H.M. Mehta, Senior Counsel with Mr. J.D.Ajmera
for Respondent No. 1.
No one appeared on behalf of Respondent No. 2.
Mr. Ashok S. Patel for Respondents No. 3 to 8.
Mr. Kirit J. Macwan for the intervener, namely
Mr. John G. Macwan, President, R.C. Mission
Primary Schools Retired Teachers Association

[As per order dated 26th of July 2001 in Civil Application No. 7752 of 2001].

CORAM : MR.JUSTICE M.R.CALLA
and
MR.JUSTICE N.G.NANDI

Date of decision: 31/07/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE M.R.CALLA)

This Letters Patent Appeal, filed by the State of Gujarat, is directed against the judgment and order dated 18th January 1997 passed by the learned Single Judge whereby the Special Civil Application No. 3635 of 1982 was allowed. Through this Special Civil Application a relief was sought with regard to payment of pension to the teachers of Non-Government (Private) recognised and Grant-in-Aided Primary Schools Schools. Originally, in the Special Civil Application filed by Smt. Kusumben E. Borasada, the order dated 3rd November 1981 passed by State of Gujarat was challenged and she claimed to be a protected teacher. Later on, this claim was given up and it was pleaded by way of amendment that the pension was being paid to the similarly situated teachers in Non-Government (Private) and recognised grant-in-aided colleges, higher secondary schools and secondary schools but the same was denied in case of the teachers of the primary schools of the same type of Non-Government (Private) recognised and aided institutions imparting primary education. It appears from the impugned order, that the State Government and its functionaries did not dispute the factual position that pension was being paid to the teachers of Non-Government (Private) and recognised grant-in-aided colleges, higher secondary schools and secondary schools. In face of this situation, the learned Single Judge found that there was no basis for giving a discriminatory treatment to the teachers of the similarly situated institutions/schools imparting primary education, that it was a case of hostile discrimination, and the action of the respondent State in not giving the pensionary benefits to the teachers of recognised aided private primary schools was declared to be ultra vires of Articles 14 and 16 of the Constitution of India, and the respondent State was directed to extend the benefits of pension to the

teachers of recognised aided private primary schools in the State of Gujarat. It was further directed that the petitioner's claim shall be worked out within a period of three months from the date of receipt of certified copy of the judgment and thereafter the petitioner shall be given the benefit of pension inclusive of arrears within next three months and it was made clear that in case the petitioner was a member of Provident Fund Scheme, she has to refund to the State the share of contribution of the employer, if any, together with the interest thereon, and the Rule was made absolute accordingly.

2. Against this order dated 18th of January 1997 passed by the learned Single Judge, the State of Gujarat preferred this Letters Patent Appeal before this Court. This Letters Patent Appeal was time barred and the application seeking condonation of delay was rejected by an order passed in Civil Application No. 11548 of 1998 on 30th of December 1998. It was, therefore, recorded in this Letters Patent Appeal by the Division Bench that in view of the order passed in Civil Application No. 11548 of 1998 this appeal does not survive. The State of Gujarat had challenged the order dated 30th of December 1998 and the order passed on the Civil Application No. 11548 of 1998, before the Supreme Court by way of Special Leave Petition. The leave was granted on 2nd of August 1999 and on the same date Civil Appeal No. 4291 of 1999 was decided by the Supreme Court. The order dated 2nd of August 1999 passed by the Supreme Court is reproduced as under :

> "Leave granted.
>
> This is an appeal against the judgment of Gujarat High Court dismissing the Letters Patent Appeal filed by the appellants on the ground of delay.
>
> The respondent herein was a craft teacher in the Web Memorial Girls High School and was taking classes for standard V to VII run by the Methodist Church, Gujarat. The said institution was recognized and government aided institution. On 12.8.78 respondent No.1 made a representation to the appellants claiming that she has been teaching in the secondary school and, therefore, was entitled to be treated as a protected teacher and also entitled to all the benefits. On the said representation, respondent No.1 was informed by an order dated 3.11.81 that as she was not working in a school having standard V to XI and

therefore she could not be treated as a protected teacher. Aggrieved, respondent No.1 filed a writ petition challenging the aforesaid order and further sought declaration that she is a protected teacher. During pendency of the writ petition, respondent No.1 filed an application for amendment of the writ petition taking a different plea that she was entitled to pensionary benefits as it was granted to the teachers of recognized grant-in-aid colleges and government schools. The said amendment was allowed. Although no reply to the amendment application was filed, it is asserted that it was brought to the notice of the Court orally that the policy decision has been taken by the State government not to grant pension to the teachers of primary schools which are in the list of grant-in-aid. The Learned Single Judge of the High Court, by an order dated 18.1.97 allowed the writ petition holding that denial of benefit of pension to the teachers of recognized aided private primary schools is discriminatory and, consequently, directed the appellants to extend the benefit of retiring pension to the teachers of government aided private primary schools in the State. Aggrieved, the appellants filed Letters Patent Appeal against the aforesaid decision of the Learned Single Judge. Since there was a considerable delay of about 7 months, the appellants filed an application for condonation of delay in filing the Letters Patent Appeal. The Division Bench of the High Court did not find the explanation furnished in the affidavit as satisfactory. Consequently, the Division Bench rejected the application for condonation of delay, as a result of which the Letters Patent Appeal was also dismissed. It is in this way the appellants are in appeal in this Court.

We have heard learned counsel for the parties. Initially we were not inclined to interfere with the order which is under challenge in this appeal. However, subsequently, it was brought to our notice that a number of writ petitions by similarly situated persons have been filed wherein identical reliefs have been claimed. It is also stated at the Bar that in one of such petitions contempt proceedings have been taken against the appellants and its officers. Keeping in view the fact that the

question involved in this matter is likely to affect a large number of persons and also considering the explanation furnished by the appellants for the delay in filing the Letters Patent Appeal, we feel that this matter requires to be finally decided by the High Court.

Keeping in view the larger interests, we condone the delay in filing the Letters Patent Appeal and send the case back to the High Court for decision on merits after setting aside the judgment under appeal. Since the respondent has to come to this Court to contest this appeal, we direct the appellants not to claim any refund of money that has already been paid to respondent no.1 in pursuance of the judgment under appeal in case the Letters Patent Appeal is decided against her". The appeal is disposed of accordingly. There shall be no order as to costs.

Application for intervention isrejected."

3. The Supreme Court categorically observed in the above order that keeping in view the fact that the question involved in this matter was likely to affect the large number of persons and keeping in view the larger interest, the delay in filing the Letters Patent Appeal was condoned and that the matter required to be finally decided by the High Court (on merits) and accordingly the Letters Patent Appeal was sent back to the High Court for decision on merits, after setting aside the judgment and order under challenge. Thereafter, on 29th of November 1999, this appeal was admitted by the Division Bench of this Court. When the matter came up before us for hearing on 26th of July 2001, during the course of hearing, we found that in the impugned judgment and order dated 18th of January 1997 it was mentioned that the teachers of Non-Government recognised grant-in-aid colleges, higher secondary schools and secondary schools were being paid the pension and the learned Single Judge has found that for the purpose of pension the primary school teachers of similar institutions could not be discriminated. However, the Government Resolutions to the effect that pensionary benefits to be given to the teachers of Non-Government recognised grant-in-aided private colleges, higher secondary and secondary schools were not produced. Time was therefore granted to the learned Assistant Government Pleader to produce such Government Resolutions and the matter was posted today, i.e., 31st July 2001. The learned Assistant Government

Pleader, Ms. Harsha Devani has today produced before us nine Government Resolutions passed on different dates from 10th of October 1961 to 18th of January 1991, and we find that the first 5 common Resolutions dated 10th October 1961, 21st December 1971, 15th October 1984, 17th December 1987 and 24th October 2000 are the relevant Government Resolutions showing that pensionary benefits had been made admissible to the teachers of Non-Government recognised grant-in-aided private colleges, higher secondary and secondary schools. The only submission, on the basis of which the judgment of the learned Single Judge has been assailed before us, is that the Government had never passed any Resolution for giving pensionary benefits to the teachers of the institutions imparting primary education, and the only reason which has been given in the reply which has been filed in the Letters Patent Appeal, is the reason relating to the financial constraints. Such reason was also advanced before the learned Single Judge coupled with the submission that there was no policy decision by the Government to give pensionary benefits to the teachers of the institutions imparting primary education in the private but aided institutions of this nature.

4. Having heard learned counsel for both the sides and having given our thoughtful consideration, we find that once it is established and which emerges as an admitted position that the teachers of Non-Government recognised grant-in-aided private colleges, higher-secondary and secondary schools are being given the pensionary benefits, what can be the justification for denying the same benefits for the teachers of the similar institutions imparting primary education. We do not find any basis to discriminate them and the reasons of financial constraints or that there was no policy decision are not at all germane to the controversy raised in this matter, and we fully agree with the reasons given by the learned Single Judge in support of his order. No discrimination can be permitted by making a class within a class. For the purpose of pension, whether the teachers are working in primary schools or in secondary, higher-secondary schools or colleges, all have to be treated at par and no discrimination can be meted out to the persons belonging to the same class. It is a clear case in which the equals have been treated in an unequal manner which strikes at the very principle of equality enshrined in Article 14 of the Constitution of India as well as Article 16 of the Constitution of India with regard to the equality of opportunity in the matters relating to employment. We, therefore, find that the grounds, on which the judgment of the learned Single

Judge has been assailed, are not tenable and we have no hesitation in holding that the teachers in the Non-Government-private but recognised and aided institutions imparting primary education are also entitled to the same pensionary benefits as are admissible to the teachers of identical institutions working in the colleges, higher-secondary schools and secondary schools. The State, being a welfare State, is not supposed to make any distinction or give a differential treatment by creating a class within a class and the teachers of the private institutions imparting primary education which are recognised and aided by the Government are also entitled to pension.

5. Therefore, while upholding the order as has been passed by the learned Single Judge, we direct the State Government to frame an appropriate scheme for the purpose of giving pensionary benefits to the teachers of the primary schools of above nature. Modalities with regard to the date of commencement of the pension scheme as also the date from which the actual payment of pension is to be made in case of teachers who were already retired may be worked out.

6. In this regard, certain aspects have been brought to our notice by the learned Senior Counsel, Mr. H.M. Mehta, and we find that such factors are relevant and quite germane for the purpose of evolving such a scheme for payment of pension to the teachers of Non-Government (Private) but Government recognised and Government Aided Primary Schools and we accordingly direct that while framing the scheme and determining the date of commencement of the scheme the State Government shall keep in view the following aspects and treat the teachers of such primary schools at par with the teachers of similarly situated Colleges/Higher Secondary Schools/Secondary Schools for the purpose of pension by issuing appropriate Government Resolution:-

(i) That The Employees' Provident Funds and Miscellaneous Provisions Act, 1952 [14th March 1952] was an Act to provide for the initiation of the Provident Funds (Pension Fund) and Deposit Linked Insurance Fund for employees in factories and other establishments;

(ii) That this Act was applied to the employees working in educational establishments on 19th of February 1982;

(iii) That as has been pointed out by Mr. H.M. Mehta, in case of educational institutions, the Supreme

Court while admitting a batch of writ petitions filed by number of educational institutions had stayed the operation of the Government of India's Notification S.O. No. 986 dated 19th February 1982, applying the Act to Educational Institutions and the general stay continued till January, 1988, and while deciding and dismissing these petitions finally in January 1988, the Supreme Court, in the cases of M/s. D.A.V. College and anr. Vs. Regional Provident Fund Commissioner and Ors., reported in 1988 (2) S.L.R. Page 170 decided on 29.1.1988 and Welham Girls High School Society, Dehradun Vs. Union of India and Others reported in 1988 (2) S.L.R. Page 172 decided on 28.1.1988 ordered as under :-

"We do not find any substance in the contention of the petitioners in these cases that the Employees Provident Fund And Miscellaneous Provisions Act, 1952 (hereinafter referred to as `the Act') has no application to the educational institutions who are petitioners in these cases. We, therefore, dismiss these cases.

2. We direct that the petitioners shall comply with the Act and the schemes framed thereunder regularly with effect from 1.2.1988. Whatever arrears they have to pay under the Act and the schemes in respect of the period between 1.3.1982 and 1.2.1988 shall be paid in each of the petitioners within such time as may be granted by the Regional Provident Fund Commissioner. If the petitioners pay all the arrears payable from 1st March, 1982 upto 1st February, 1988 in accordance with the directions of the Regional Provident Fund Commissioner he shall not levy any damages for the delay in payment of the arrears. Having regard to the special facts of these cases the subscribers (the employees) shall not be entitled to any interest on the arrears. The Writ Petitions are disposed of accordingly. No costs."

(iv) In the light of the Supreme Court's judgment as aforesaid, it may be considered that as a consequence of general stay granted by the Supreme Court of the operation of the Government of India's notification S.O. No. 986 dt. 19th Feb. 1982 the educational institutions had not recovered the employees' share of contributions

from their wages during the period (March 1982 to January 1988) when the stay order was in force and therefore in such cases insistence of the payment of the employees'share of contributions by the institutions themselves will not be in order. Therefore, it was decided by the Central Board of Trustees in consultation with the Ministry of Labour, Government of India, that in cases where the educational institutions had not actually recovered the employees' share of contributions from their wages for the period from 1.3.1982 to 31.1.1988, payment of the same need not be insisted upon and the same may be waived except in cases where the employer or the employees volunteer to pay the same in lump-sum or in instalments and in cases where the employees' share of contribution for the abovesaid period has already been deposited by any of the educational institutions and has been credited to the respective accounts of the employees, the question of its refund does not arise and such cases should not be reopened.

(v) The date of judgment of the learned Single Judge is 18th January 1997.

7. All these factors may be taken into consideration for the purpose of fixing the date of commencement of the scheme with regard to the teachers of the private institutions imparting primary education which are recognised and aided, and in case of retired teachers, the amount of pension be fixed on notional basis from the date of the commencement of the scheme. Such scheme shall be framed by the Government within a period of three months from the date of receipt of the certified copy of this Order, as may be served by either of the parties or through the Court, and the same shall be appropriately notified, acted upon and given effect to and the due benefits shall be given to the retired teachers also who are found to be entitled for the pension. The Appeal is hereby dismissed with no order as to costs with the directions as above.

[M.R. Calla,J.]

rmr. [N.G. Nandi,J.]